UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

07-CV-11092-RGS

LINDA RAPPAPORT

v.

BERNARD HODES GROUP
And
JOSEPH FORTUNATO

MEMORANDUM AND ORDER ON
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

May 4, 2009

STEARNS, D.J.

Linda Rappaport, an erstwhile Senior Vice-President at Bernard Hodes Group (BHG), alleges that she was fired after Joseph Fortunato, BHG's Chief Financial Officer, learned that she suffered from multiple sclerosis (MS). Defendants seek summary judgment on all claims, contending that Rappaport was dismissed for failing to meet her performance goals.

BACKGROUND

The facts in the light most favorable to Rappaport as the nonmoving party are as follows. Rappaport was diagnosed with MS in 1974. Before joining BHG, Rappaport served as the Chief Operating Officer at both JWG Company (JWG) and Webhire, two of BHG's competitors. At JWG she oversaw some 350 employees.

BHG is an international company offering "recruitment, communications, and staffing solutions." Many of BHG's clients are healthcare providers. In June of 2002, Bruce Skillings, BHG's President, approached Rappaport to ask if her employment at JWG

was covered by a non-compete agreement. In March of 2003, Rappaport met with Fortunato and Alan Schwartz, BHG's Chief Executive Officer. In April of 2003, BHG offered Rappaport a Senior Vice-President's position. Rappaport accepted and joined BHG on May 31, 2003.[1] Other than members of BHG's Executive Committee, Rappaport's $200,000 salary exceeded that of any other BHG employee.

Rappaport was asked to assess the performance of BHG's New Business and Healthcare Division. Rappaport produced a sales training manual and workbooks, and conducted a training seminar for eighteen people. Fortunato announced that he was naming Rappaport "Manager of Business Development" for the Eastern, Mid-Western, and Mid-Atlantic regions. Fortunato shifted responsibilities away from BHG's Regional and Branch Managers and gave them to Rappaport. As Manager of Business Development, Rappaport had hiring authority and supervised a "New Business Team" (NBT) of five salespeople. Each member of Rappaport's NBT was given a goal of generating $300,000 - $400,000 in gross revenue. Rappaport's salespeople, however, fell well short of the goal.[2]

In May of 2004, Fortunato discussed Rappaport's disappointing performance with BHG's Executive Committee, which was concerned because new clients were not coming

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[1]In a press release announcing Rappaport's hiring, BHG stated that Rappaport "will provide key support specifically in the areas of client acquisition and development and client relations." Complaint ¶ 11.

[2]Rappaport claims that when she was promoted, she and Fortunato discussed the goals for her sales team. She told Fortunato that he could set any goals he wanted but the NBT could not meet them because the salespeople "lacked training experience and sales pipelines." Plaintiff's Statement of Facts ¶ 35.

"out of the woodwork" as anticipated and Rappaport's salespeople were not performing as expected. Skillings recommended that Rappaport be fired, but the Executive Committee decided to give her additional time. Schwartz named Rappaport Regional Manager of the Boston office, lauding the "'energy, commitment and knowledge that [Rappaport had] brought with her to the company.'" Complaint ¶ 17. The new position was created for Rappaport by transferring responsibilities from BHG's Northeastern Regional Manager. During Rappaport's ten-month tenure managing the Boston office, it operated at a loss of $193,245.91.[3]

In February of 2005, the Executive Committee returned to the termination issue. Rappaport was then in the midst of preparing a presentation for Tenet Healthcare, potentially one of BHG's largest accounts. Rappaport was given no inkling that her job was in jeopardy.[4]

By February of 2005, Rappaport's MS was worsening.[5] She discussed her

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[3]In March, Rappaport's final full month in Boston, the office reported a loss of $46,000. Rappaport partly attributes the losses to the departure of three major accounts prior to her becoming the manager of the Boston office.

[4]In May of 2004, Rappaport made repeated requests for a written evaluation, which was not forthcoming. She completed a self-evaluation instead. Fortunato told her that he agreed with everything she had written. Complaint ¶ 18. In her self-evaluation, Rappaport wrote that "[a]lthough the revenue is not what we would like it to be [for the NBT], it has only been six months." Defendants' Ex. 5. In addressing the state of the Boston office, Rappaport wrote: "I ask for indulgence to provide me time to fix this. I realize this is about the money, however I am sorry to say, the business was never stabilized and the issues [will] not be fixable in certain situations." Id.

[5]By April of 2005, Rappaport's bladder had ceased to function, and she suffered from choking spells and foot drop.

symptoms with Jeff Giberson, BHG's Vice-President of Human Resources.[6] Giberson assured Rappaport that she was protected under the Americans with Disabilities Act (ADA). On March 16, 2005, the day before the Tenet presentation, Rappaport met with Fortunato and disclosed that she had MS. She told Fortunato that she did not know what would "happen down the road." She also told him that she would be starting a new course of treatment and would need to take time off once a month, possibly working at home for a few days following the treatments. Fortunato replied, "okay." The next day, Rappaport oversaw BHG's second presentation to Tenet. BHG did not win the Tenet account.[7]

On April 13, 2005, Rappaport e-mailed another disappointing NBT quarterly report to Fortunato. Five days later, Fortunato told Rappaport that she had been terminated. BHG did not hire a replacement. Instead, Rappaport's duties were delegated to other managers. Harold Levy, the Northeast Regional Manager, assumed responsibility for the Boston office.

Rappaport filed her initial Complaint on April 19, 2007, in the Massachusetts Superior Court,[8] alleging wrongful termination in violation of the antidiscrimination provisions of Mass. Gen. Laws ch. 151B, § 4, and the ADA, 42 U.S.C. § 12101 et seq. Defendants removed the Complaint to the United States District Court on June 13, 2007.

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[6]Rappaport claims to have disclosed her MS to a co-worker in the summer of 2004 who told her, "don't tell the boys at BHG, they will never look at you the same way. They will look at you as weak." Complaint ¶ 20.

[7]Rappaport attributes the failure to her not being allowed to lead the presentation.

[8]Rappaport first filed the required administrative charge with the Massachusetts Commission Against Discrimination (MCAD). Complaint ¶ 29.

On November 7, 2008, after the completion of discovery, defendants filed this motion for summary judgment on the remaining counts of Rappaport's Complaint.[9] The court heard oral argument on the motion on February 9, 2009.

DISCUSSION

Summary judgment is appropriate when, based upon the pleadings, affidavits, and depositions, "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Gaskell v. Harvard Co-op Soc., 3 F.3d 495, 497 (1st Cir. 1993). "In this context, 'genuine' means that the evidence is such that a reasonable jury could resolve the point in favor of the nonmoving party." Rodriquez-Pinto v. Tirado-Delgado, 982 F.2d 34, 38 (1st Cir. 1993). To succeed, the moving party must show that there is an absence of evidence to support the nonmoving party's position. Rogers v. Fair, 902 F.2d 140, 143 (1st Cir. 1990). If this is accomplished, the burden then "shifts to the nonmoving party to establish the existence of an issue of fact that could affect the outcome of the litigation and from which a reasonable jury could find for the [nonmoving party]." Id. The nonmoving party "must adduce specific, provable facts demonstrating that there is a triable issue. There must be 'sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted.'" Id. (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-250 (1986)). Although summary judgment is "admittedly a disfavored remedy in discrimination cases based on

[9]A common-law claim of intentional infliction of emotional distress, and claims under the Massachusetts Constitution and the State Civil Rights Act were dismissed as the litigation progressed. Alan Schwartz was also dismissed as a defendant.

disparate treatment . . . summary judgment is not always inappropriate in these cases." Matthews v. Ocean Spray Cranberries, Inc., 426 Mass. 122, 127 (1997).

A prima facie case of disability discrimination requires proof of virtually identical elements under state and federal law. A plaintiff must demonstrate that: "(1) [s]he is a member of a class protected by Mass. Gen. Laws ch. 151B; (2) [s]he performed [her] job at an acceptable level; (3) [s]he was terminated; and (4) [her] employer sought to fill the plaintiff's position by hiring another individual with qualifications similar to the plaintiff's." Blare v. Husky Injection Molding Sys. Boston, Inc., 419 Mass. 437, 441 (1995). A successful prima facie case raises a presumption of discrimination. Id. (citing Texas Dep't of Cmty Affairs v. Burdine, 450 U.S. 248, 254 (1981)).[10]

Under the familiar burden-shifting analysis applied by the state and federal courts in disparate impact cases, the employer may rebut the discrimination presumption by producing evidence that the adverse employment action (termination) was undertaken for nondiscriminatory reasons. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The employer's supporting facts must include "'credible evidence' . . . [that] show[s] that the reason or reasons advanced were the real reasons." Blare, 419 Mass. at 442. "The employer's reasons need not be wise, so long as they are not discriminatory

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[10]Under the ADA, to establish a prima facie case, a plaintiff must demonstrate that she:

> (i) has a disability within the meaning of the Act; (ii) is qualified to perform the essential functions of the job, with or without reasonable accommodations; (iii) was subject to an adverse employment action by a company subject to the Act; (iv) was replaced by a non-disabled person or was treated less favorably than non-disabled employees; and (v) suffered damages as a result.

Jacques v. Clean-Up Group, Inc., 96 F.3d 506, 511 (1st Cir. 1996).

and they are not pretext." Tardanico v. Aetna Life & Cas. Co., 41 Mass. App. Ct. 443, 448 (1996). "If the defendant's reasons are not discriminatory, and if the plaintiff does not prove that they are pretexts, the plaintiff cannot prevail." Matthews, 426 Mass. at 128. The employer's burden is one of production, rather than persuasion; the burden of proving discrimination remains always with the employee. See Lewis v. City of Boston, 321 F.3d 207, 214 (1st Cir. 2003).[11]

As reasons for Rappaport's termination, defendants point principally to the failures of the NBT, principally its inability under her leadership to turn a profit.[12] Additionally, defendants rely on the fact that Rappaport's position was not filled after her termination, but was instead abolished and her job duties assigned to existing employees.[13] And finally, defendants cite Rappaport's failure to win the Tenet account.

If the employer meets its burden of production, at the third and final stage of the analysis, "the employee must show that the basis of the employer's decision was unlawful

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[11]A showing of pretext alone provides a sufficient basis for a verdict in a plaintiff's favor, but such a verdict is not compelled. See Lipchitz v. Raytheon Co., 434 Mass. 493, 504 (2001); Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 117-118 (2000). See also Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142-143 (2000).

[12]It will be recalled that during Rappaport's ten months as the Manager of the Boston Office it operated at a loss of $193,245.91, a figure that Rappaport does not dispute.

[13]"A discharged employee 'is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work.'" LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 846 (1st Cir. 1993), quoting Barnes v. GenCorp Inc., 896 F.2d 1457, 1465 (6th Cir. 1990). "Rather, a person is replaced only when another employee is hired or reassigned to perform the plaintiff's duties." Id.

discrimination." Cariglia v. Hertz Equip. Rental Corp., 363 F.3d 77, 84 (1st Cir. 2004), quoting Abramian, 432 Mass. at 117. The plaintiff must "produce evidence sufficient to support a jury verdict that it was more likely than not that the articulated reason was pretext for actual discrimination." Blare, 419 Mass. at 447.[14] See also Reeves, 530 U.S. at 143 (2000) (holding plaintiff must have the opportunity to prove pretext). The "employee [must] proffer enough competent evidence to support two findings: 1) the employer's proffered reason was pretextual; and, 2) its true motive was [handicap] discrimination." Ruiz v. Posadas De San Juan Assocs., 124 F.3d 243, 248 (1st Cir. 1997).

A plaintiff may establish pretext by comparing herself with employees who are not disabled, but she "must provide a suitable provenance for the evidence by showing that others similarly situated to [her] in all relevant respects were treated differently by the employer." Conward v. Cambridge Sch. Comm., 171 F.3d 12, 20 (1st Cir. 1999). See also Garcia v. Bristol-Myers Squibb Co., 535 F.3d 23, 31 (1st Cir. 2008) (same). "Reasonableness is the touchstone: while the plaintiff's case and the comparison cases that [s]he advances need not be perfect replicas, they must closely resemble one another

[14]While in St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993), the Supreme Court "envisioned that some cases exist where a prima facie case and the disbelief of pretext *could* provide a strong enough inference of actual discrimination to permit the fact-finder to find for the plaintiff. . . . [W]e do not think that the Supreme Court meant to say that such a finding would *always* be permissible. . . . The strength of the prima facie case and the significance of the disbelieved pretext will vary from case to case depending on the circumstances." Woods v. Friction Materials, Inc., 30 F.3d 255, 261 n.3 (1st Cir. 1994) (emphasis in original). "Thus, whether the plaintiff relies solely on his prima facie case and evidence of pretext or has additional evidence of specific intent as well, the plaintiff must *always* adduce evidence sufficient for a rational jury to conclude that the employer's action was motivated by an intent to [discriminate]." Barbour v. Dynamics Research Corp., 63 F.3d 32 (1st Cir. 1995).

in respect to relevant facts and circumstances." Conward, 171 F.3d at 20.

> The test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated. Much as in the lawyer's art of distinguishing cases, the "relevant aspects" are those factual elements which determine whether reasoned analogy supports, or demands, a like result. Exact correlation is neither likely nor necessary, but the cases must be fair congeners. In other words, apples should be compared with apples.

Id. (quoting Dartmouth Review v. Dartmouth College, 889 F.2d 13, 19 (1st Cir. 1989)).

Rappaport complains that able-bodied managers in five BHG sectors were not fired despite unsatisfactory results in the years prior to her tenure. BHG's New York Combined offices lost $1.23 million in 2002. BHG waited until 2003 to fire Jennifer Williams, the Branch Manager of the New York Combined offices, giving her several months longer than Rappaport was given to turn a profit. BHG's Long Island Combined offices lost $243,316 in 2002 and $10,976 in 2003; however, the Branch Manager (Jody Ordioni) was kept on until 2004. Under the management of Rappaport's predecessor, Geri Pembroke, the Boston office suffered a loss of $415,000 although it made a profit of $7,000 in 2003. Pembroke, nonetheless remained at BHG as a Senior Vice-President. Under the Northeast Regional Manager, Philip Gentile, northeast region suffered a loss of $1.49 million dollars in 2002, and a further loss of $288,000 in 2003. In spite of the poor performance on his watch, Gentile was transferred to a position on the West coast. Finally, when Harold Levy, the Northeast Regional Manager, was determined to be underperforming, he was offered the chance to find another position within the company.

Rappaport's comparative exercise fails at the outset. Her initial problem is the *sui generis* nature of her position at BHG. The job of Manager of Business Development was

created specially for Rappaport by consolidating duties that had been previously assigned to the BHG Regional Managers and combining them with the new position of Regional Manager of BHG's Boston office to whom the Branch Manager reported. Williams, Pembroke, and Ordioni, the first three of Rappaport's proposed doppelgangers, were simply not "similarly situated." All three held subordinate positions as Branch Managers and answered to Regional Managers like Rappaport (as did the Branch Manager in Boston who reported to Rappaport). Personnel matters involving Regional Managers were handled at the Executive Committee level while Williams, Pembroke, Ordioni and other Branch Managers were under the supervision of the Regional Managers.

Rappaport's attempt to compare herself with Regional Managers Levy and Gentile, while more plausible, also fails. Gentile had worked for BHG for eighteen years by the time Rappaport was fired and yet earned considerably less than he did.[15] Although Gentile was not fired for his earnings results, he was demoted to a "less senior" position on the West Coast and was required to earn his way back to a Regional Manager's position. The offices managed by Levy, on the other hand, operated at a collective profit during the same eight-month period that Rappaport's operation chalked up a substantial loss (all three of Levy's offices were restored to profitability by the end of 2004).[16]

Another approach a plaintiff may take in exposing pretext is to show that the

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[15]Only Levy, who oversaw three branch offices as opposed to Rappaport's one, made a comparable salary. Gentile earned a considerable smaller annual salary of $115,000.

[16]Long Island, New Jersey, and New York – the three offices Levy managed – recorded a total combined profit of $611,684.23 during May through December of 2004.

employer's explanation for her termination is not credible. See Burdine, 450 U.S. at 256. The employee may demonstrate the "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action [so] that a reasonable factfinder could rationally find them unworthy of credence." Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 168 (1st Cir. 1998)(citations omitted).

Rappaport offers the following as supporting an inference of pretext. First, that her termination followed closely on the heels (twenty-six days) of her having disclosed her MS to Fortunato; and second, that on assuming oversight of the Boston office she was not warned that her tenure at BHG was contingent on her ability to return the office to profitability. She also complains that prior to her appointment she was not told that the office had recently lost three significant accounts which had generated approximately $1.5 million in annual revenue.[17] Rappaport's second ground of suggested "pretext" is puzzling. Termination for failing to meet an employer's performance targets or job expectations, even if the goals are unarticulated to the employee, would seem a classic example of a nondiscriminatory reason for an adverse employment action (whether fair or not).

Turning to the first and more plausible ground, it is true that Fortunato informed Rappaport of her termination within a month of being told of her MS. However, timing alone is ordinarily insufficient to support a claim of discrimination. If temporal proximity is the only evidence establishing retaliation, the proximity must be "very close." Bishop v. Bell Atlantic Corp., 299 F.3d 53, 60 (1st Cir. 2002). See also Soileau v. Guilford of Me.,

[17]Rappaport also points to the fact that she was never given a formal performance review, but offers no evidence that any other employee at or near her level was given a written evaluation.

105 F.3d 12, 16 (1st Cir. 1997) ("A narrow focus [on timing] ignores the larger sequence of events and also the larger truth."). Here, the close temporal connection between the two events would ordinarily be enough to scrape over the summary judgment bar. It does not in Rappaport's case for four reasons. First, the seeds of the decision to terminate Rappaport were planted well before the disclosure of MS to Fortunato or anyone else at BHG. It will be recalled that Skillings recommended that Rappaport be terminated for poor performance in May of 2004, and that by February of 2005, the Executive Committee revisited the issue. The Committee delayed making a final decision only because of the pendency of the Tenet presentation. See Mole v. Univ. of Mass., 442 Mass. 582, 594 (where "other problems with an employee predate any knowledge that the employee has engaged in a protected activity, it is not permissible to draw the inference that subsequent adverse actions, taken after the employer acquires such knowledge, are motivated by retaliation"). Second, Rappaport has produced no other evidence on which a finder of fact could base a finding of discriminatory animus. While a plaintiff may rely on the same evidence to prove pretext and discrimination under Hicks, a plaintiff does not thereby mechanically survive summary judgment. Rodriguez-Cuervos v. Wal-Mart Stores, Inc., 181 F.3d 15 n.5 (1st Cir. 1999). "Even in discriminatory discharge cases, where the plaintiff can rarely present direct, subjective evidence of an employer's actual motive, the plaintiff cannot survive summary judgment with unsupported allegations and speculations, but rather must point to specific facts detailed in affidavits and depositions – that is, names, dates, incidents, and supporting testimony – giving rise to an inference of discriminatory animus." Hoeppner v. Crotched Mountain Rehab. Ctr., Inc., 31 F.3d 9 (1st

Cir. 1994) quoting Lipsett v. Univ. of Puerto Rico, 864 F. 2d 881, 895 (1st Cir. 1988). Third, the evidence offered by BHG of a nondiscriminatory motive is exceptionally strong and largely uncontradicted: the poor sales results achieved by Rappaport's NBT; the persistent losses compiled by the Boston office; and Rappaport's failure to win the Tenet account. Uncontroverted (or barely so) evidence that a nondiscriminatory reason explains the employer's decision entitles an employer to summary judgment. Reeves, 530 U.S. at 148. See also Dominguez-Cruz v. Suttle Caribe, Inc., 202 F.3d 424 n.5 (1st Cir. 2000). Finally, there is a critical defect in Rappaport's prima facie case: there is no evidence that after terminating Rappaport that BHG filled her job by hiring a replacement or even sought to do so.[18] For these four reasons, defendants' motion for summary judgment as to these claims will be ALLOWED.

Failure to Accommodate (Counts II & IV)

To prevail on a failure to accommodate claim, a plaintiff must show that she was disabled, that with or without reasonable accommodation she was able to perform the essential functions of her job, and that the employer, despite knowing of her disability, failed to reasonably accommodate it. See Rocafort v. IBM Corp., 334 F.3d 115, 119 (1st Cir. 2003).[19] The employer's duty to accommodate is triggered by a request from the employee. See Reed v. Lepage Bakeries, Inc., 244 F.3d 254, 261 (1st Cir. 2001). The

[18]In a termination case, the plaintiff must prove that after being discharged the employer sought someone of roughly equivalent qualifications to perform substantially the same work. Mulero-Rodriguez v. Ponte, Inc., 98 F.3d 670, 673 (1st Cir. 1996). See also Byrd v. Ronayne, 61 F.3d 1026, 1031 (1st Cir. 1995).

[19]Defendants question the motivation behind Rappaport's disclosure; coming as it did one day before the critical Tenet presentation.

employee's request "must be sufficiently direct and specific," and "must explain how the accommodation requested is linked to some disability." Freadman v. Metro. Prop. & Cas. Ins. Co., 484 F.3d 91, 102 (1st Cir. 2007) (citations omitted); Estades-Negroni v. Assocs. Corp. of N. Am., 377 F.3d 58, 64 (1st Cir. 2004).

On March 16, 2005, Rappaport disclosed her MS to Fortunato. She told him she did not know what would "happen down the road." Rappaport recalls that Fortunato said "okay" when she told him she would report back when she knew which drug she was going to take. That was the extent of the discussion. Although Rappaport contends that she used the word "accommodation" during the conversation with Fortunato, she never actually asked for one. Rappaport does not point to any *specific* request that she made that defendants denied. See Freadman, 484 F.3d at 102. While she did tell Fortunato that she might have to work at home for a few days following her monthly treatments, she was already permitted to work from home when she wished. (It is undisputed that almost 10 percent of BHG's employees were allowed to work from home). Therefore, defendants' motion for summary judgment as to Counts II and IV will also be ALLOWED.

Retaliation

Retaliation is an independent cause of action under the ADA and Mass. Gen. Laws ch. 151B. See Wright v. CompUSA, Inc., 352 F.3d 472, 477 (1st Cir. 2003) (noting that a plaintiff need not succeed on a discrimination claim to assert a claim of retaliation). To establish a claim of retaliatory discharge under Title VII, a plaintiff must show by a preponderance of the evidence that: (1) she engaged in a protected activity as an employee; (2) she was subsequently discharged from employment; and (3) there was a

causal connection between the protected activity and the discharge. Hernandez-Torres v. Intercont'l Trading, Inc., 158 F.3d 43, 47 (1st Cir. 1998). See also Mole, 442 Mass. at 591-592.[20] Rappaport claims that her request for accommodation was a protected activity and that she was terminated for exercising her rights.[21] But, as noted above, Rappaport never actually requested an accommodation within the meaning of the statute, nor could Fortunato's noncommittal reply – "okay" – be fairly characterized as a negative reaction or rejection. See Guzman-Rosario v. UPS, 397 F.3d 6, 12 (1st Cir. 2005) (retaliation claim defeated at summary judgment because even if a plaintiff's informing her supervisor of her disability could be considered a request for an accommodation, a "doubtful assumption," there was nothing to suggest a negative reaction by the supervisor to the disclosure). Consequently, defendants' motion for summary judgment on the claim of retaliation will be ALLOWED.

Aiding and Abetting Against Fortunato

To establish individual liability under state law, Rappaport must prove that Fortunato had the requisite intent to discriminate and aided and abetted the employer's decision to terminate her. See Beaupre v. Cliff Smith & Assocs., 50 Mass. App. Ct. 480, 495 n.23

[20]If a prima facie case is established, the defendant "must articulate a legitimate, non-retaliatory reason for its employment decision." Valentin-Almeyda v. Munic. of Aguadilla, 447 F.3d 85, 95 (1st Cir. 2006) (citations omitted). "If the defendant meets this burden, the plaintiff must [then] show that the proffered legitimate reason is in fact a pretext and that the job action was the result of the defendant's retaliatory animus." Calero-Cerezo v. United States DOJ, 355 F.3d 6, 26 (1st Cir. 2004).

[21]The First Circuit has assumed, without deciding, that simply requesting an accommodation is protected behavior. See Wright, 35 F.3d at 477.

(2000).[22] As there is no evidence to support Rappaport's underlying claim of discrimination, it follows that there can be no liability on Fortunato's part.

ORDER

For the foregoing reasons, defendants' motion for summary judgment is ALLOWED in its entirety. The Clerk will enter judgment for the defendants and close the case.

SO ORDERED

/s/ Richard G. Stearns

UNITED STATES DISTRICT JUDGE

[22]It is doubtful that an individual liability claim can be sustained under Title VII. See Serapion v. Martinez, 119 F.3d 982, 992 (1st Cir. 1997). See also Tomka v. Seiler Corp., 66 F.3d 1295, 1314-1317 (2d Cir. 1995) ("[I]ndividual defendants with supervisory control over a plaintiff may not be held personally liable under Title VII.").